IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Second Appeal No.38 of 2007
With
Civil Application No.70 of 2007

M/s.Ishwar Constructions Pvt.Ltd.
and anr. Appellants
Vs.
Ashok Chadha & ors. Respondents

With

Second Appeal No.62 of 2007
With
Civil Application No.112 of 2007

M/s.Ishwar Constructions Pvt.Ltd.
and anr. Appellants
Vs.
Shri Anil V. Mahtaney Respondent

Mr.K.Y.Mandlik for appellants.

Mr.Y.R.Naik for Respondent Nos. 2 to 11, 13 to 21, 23, 24, 26 to 28, 30, 32 to 34, 36 & 38 in S.A.38/07 and for respondent in S.A.62/07.

CORAM: B.H.MARLAPALLE, J.

Reserved on : April 16, 2007.
Pronounced on : May 04, 2007.

ORAL ORDER:

1. These two Second Appeals arise from the Judgment and decree passed by the learned Ad-hoc District Judge, 12, Pune in Civil Appeal No.335 of 2000 and Civil Appeal No.189 of 2000. Both the appeals were partly allowed. Civil Appeal No.335 of 2000 arising from Regular Civil Suit No.324 of 1996 was decided on 20/9/2006 whereas Civil Appeal No.189

of 2000 arising from Regular Civil Suit No.326 of 1995 came to be decided on 30/9/2006. RCS No.326 of 1995 (hereinafter referred to as "the earlier Suit") was filed for declaration and permanent injunction and by the judgment and order dated 29/1/2000 it came to be dismissed by the learned 7th Jt. Civil Judge, Junior Division at Pune. Whereas RCS No. 324 of 1996 (hereinafter referred to as "the later Suit") was filed for declaration, injunction and specific performance. In both the suits the property concerned is common viz. the housing scheme comprising of four buildings "A", "B", "C" and "D" and developed under the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (for short "the Flats Act") and located on the plot of land admeasuring 12,599.79 sq.mtrs. (less approximately 2787 sq.mtrs. occupied by the State Government) of City Survey No.425-4, 5, 6-B, 7, 8, 9 of B.J. Road, Pune 411 001. The decree passed in Civil Appeal No.189 of 2000 reads thus:

(1) The appeal is allowed partly.

(2) The judgment and decree passed by the

learned 7th Jt. C.J.J.D. Pune on 29/1/2000 in RCS No.326/95 is hereby set aside.

(3) The suit is decreed with costs.

(4) The defendant nos.1 and 2 are permanently restrained from making any additional construction in the open space and the property in City Survey No.425, 4, 5, 6-B, 7, 8, 9 of B.J. Road,Pune or any building therein including the Club House in any manner.

. Whereas the decree passed in Civil Appeal No.335 of 2000 reads as under:

(1) The appeal is allowed.

(2) The judgment and decree passed by the learned 10th Jt. C.J.J.D., Pune on 9/3/2000 in RCS No.324 of 1996 is hereby set aside.

(3) The suit is decreed partly with costs and it is hereby declared that the deed of declaration dated 1/7/1993 subjecting the

scheme to the Maharashtra Apartment Ownership Act, 1970 is hereby declared as illegal and the defendant nos.1 and 2 are hereby directed to form a co-operative housing society under the provisions of the Maharashtra Co-operative Societies Act within a period of six months from today defining in clear terms the rights of the plaintiffs and purchasers of flats on the basis of the sale agreement entered by them from out of the cost and charged they have recovered from them.

(4) The defendant nos.1 and 2 are further restrained from making any additional construction in the open space and the property and are restrained from preventing the plaintiffs and the flat purchasers from using and enjoying the common areas and amenities provided.

2. The earlier suit was filed by Shri Anil Mahtaney for declaration and permanent injunction whereas the later suit was filed by 40 flat owners. The housing complex consisting of four buildings referred to hereinabove as "A", "B", "C" and "D" came

to be named as "Parmar Paradise" and the plaintiffs are the owners of flats in the said housing complex at Pune. In the earlier suit, the defendant no.1 was the company i.e. M/s. Ishwar Constructions Pvt. Ltd. who was the developer and defendant no.2 was its Managing Director whereas in the later suit in addition to these two defendants, the Municipal Commissioner of Pune Municipal Corporation was impleaded as the third defendant. The later suit was for declaration and injunction. It is under these circumstances that these Second Appeals are being decided by a common order, on the basis of the paper-book that has been submitted by the learned counsel for the appellants - original defendant nos.1 and 2.

3. The suit plot originally belonged to Smt. Gosap Banu, wife of Manikchand Sorabjee Captain and the husband was the life beneficiary under the Deed of Settlement dated 10th June 1930. By an agreement dated 4th December 1983, the defendant no.2 purchased the suit plot. The competent authority for determination of the surplus land, by its order dated 27th September 1984 passed under Section 8(4) of the Urban Land (Ceiling and Regulations) Act, 1976 held

that there was no vacant land and thereafter the sale deed was executed in favour of the defendant no.2 on 11th March 1985 and the same was registered. The defendant no.2 thereafter promoted a scheme of construction of residential flats on the said plot and the construction to be carried out by the defendant no.1 - company under the Flats Act. Each building was to contain 16 flats thus making a total of 64 flats in the proposed housing complex called Parmar Paradise and the first agreement for sale was signed on 21st January 1988 and it was registered on 12th February 1988 between the plaintiff in the earlier suit and the defendant nos.1 and 2. The plaintiffs in the later suit have signed the agreements between the period from July 1985 to October 1992. Undoubtedly the flat owners were put in possession by the end of 1992 and the completion certificate dated 30/6/1993 also was issued by the Pune Municipal Corporation. On or about 2nd February 1993 the Developers collected an amount of Rs.3100/- from each of the plaintiffs as being the charges towards the share money and formation of the co-operative housing society by cheque and the receipt was issued (Exhibit 32) to that effect.

4. Though the housing scheme was developed under the Flats Act and in the agreement for sale itself it was the commitment made by the developers that the flat owners' co-operative housing society shall be registered and an amount of Rs.3100/- was collected accordingly in February 1993, surprisingly on 1/7/1993 the developers submitted a deed of declaration and got the same registered in respect of the suit flats (Parmar Paradise) under the Maharashtra Apartment Ownership Act, 1970 (for short "the Apartments Act"). Subsequently each of the flat owners was called upon to sign the deed of agreement under the Apartments Act (Exhibit 33 is the Deed of Declaration and Exhibit 35 is the Deed of Apartments). The developers subsequently and without the consent of flat owners carried out certain additions and alterations in the open land, they also made structural changes without the approval of the plaintiffs or any other flat owner. As per the plaintiffs certain common amenities like sports facilities and health club etc. as were promised while signing the agreement for sale (Schedule-C) were not provided and on the contrary the developers made encroachment by additional construction of approximately 1500 sq.ft. The construction of the

club house was not carried out as promised in the agreement and on the contrary the defendant nos.1 and 2 constructed first and second floor on the building which was supposed to be a club house. It was further alleged that the club house so constructed was divided into two health clubs which were being run on commercial basis. With all these grievances the plaintiffs had approached the trial Court for the following reliefs:

(a) Deed of Declaration executed under the Apartments Act on 1/7/1993 be declared as illegal.

(b) The defendants were not entitled to carry out any additions, alterations and construction on the suit land and more particularly in the open space in the form of building or on the existing construction including the Club House or in any manner whatsoever to that effect.

(c) For directions to the Defendant Nos.1 and 2 to form a Co-operative Housing Society and convey all the common spaces, open spaces

without any reservation in favour of the said Society or alternatively, the Defendant Nos.1 and 2 be directed to delete all the reservations made in favour of Defendant Nos.1 and 2 and reserving the same for common use of all the flat owners.

(d) For a permanent injunction from implementing the Deed of Declaration dated 1st July 1993 and from carrying out any additions, alterations in the form of any any construction or any structural changes, additions, alterations of whatsoever nature on the suit land including the common amenities and existing buildings and the Club house building and and defendant nos.1 and 2 be restrained from submitting any plan, revised plan for sanction to Defendant No.3.

5. On assessment of the oral and documentary evidence adduced by the parties the trial Court in the earlier suit held that the developer had acted in breach of the agreement for sale but the plaintiff could not prove that the developer had acted in breach of the Flats Act. It further held that the

developer had revised the earlier plans approved by the Corporation without the consent of the plaintiff and the objection raised by the defendants regarding non-joinder of parties was rejected. However, the trial Court held that the plaintiff was not entitled to the declaration and injunction sought for and the reasoning in support of this refusal to grant the relief was set out in the following words:

> "...According to me after amendment of Section 7A the defendant can construct an additional building if competent authorities had given legal sanction to the building. The defendants cannot alter or change the structure of the building which is purchased by the plaintiff. Here, in this matter the defendant cannot change the structure of plaintiff's flat nor change the structure of the plaintiff's building. Here, in this matter he is constructing the additional building as per sanctioned plan. According to me, after amendment of the provisions of Section 7A and in the light of above discussion of the judgment in Khatri Builders Vs. Mohmed Farid Khan **[1992 (1) Bom.C.R.**

305]. In my opinion, the plaintiff is not entitled for the relief of injunction for restraining the defendant not to construct the additional building. So far as the other prayers of the plaintiffs are concerned, the defendants have flouted their words and did not provide the facilities which they were bound to provide. And so far as the breach of agreement in between the plaintiff and defendants is concerned, in respect to provide the common amenities, it is no doubt clear that, the defendants did not obey their words and did not provide the common facilities as assured vide Exh. 61 Clause-C. In my view if the defendants are not providing the common facilities as per agreement, giving an injunction against the defendants or restraining them from making additional construction as per sanctioned plan is not a relief or Court cannot grant such relief in favour of the plaintiff. If the defendants have not followed the contract, it is the plaintiff who can take action against the defendants in respect of breach of agreement. He can file suit for compensation against the

defendants, in respect of the breach of agreement and not providing the common facilities...."

5A. In the later suit the trial Court held:

(a) that the plaintiffs could not prove that the defendant nos.1 and 2 had agreed to form a society.

(b) that the defendant nos.1 and 2 made additions.

(c) that the defendant nos.1 and 2 made additions alterations and structural changes in the construction without the consent of the owners.

The trial Court further held that the suit was within limitations and the Court had the jurisdiction to entertain and try the suit but the plaintiffs were not entitled to claim specific performance under the Flats Act and they were accordingly not entitled for the declaration and injunction as prayed for.

6. In Appeal No.189 of 2000 the lower Appellate Court held that it was obligatory on the part of the developer to form a co-operative housing society, that the developer had made illegal construction without any right and interest and, therefore, the judgment and decree of the trial Court was not sustainable. Whereas in Appeal No.335 of 2000 the lower Appellate Court held that the defendant nos.1 and 2 had made illegal changes in the construction plans and the trial Court was in error in holding that the deed of declaration and deed of apartment was binding on the flat owners and consequently the judgment and decree passed by the trial Court was unsustainable.

7. The agreement for sale which was registered on 23/7/1985 in favour of plaintiff no.9 was at Exhibit 29. On 30/6/1993 the completion certification (Exh. 33) was issued by the Municipal Corporation. The plans sanctioned by the Municipal Corporation were at Exhibits 127 to 134. In the plan at Exhibit 127 the four buildings sanctioned in September 1990 were shown as "A-1", "A-2", "B-1" and "B-2". These buildings were subsequently renumbered as "A", "B", "C" and "D". The plan at Exhibit 128 and sanctioned

in January 1995 showed a single storeyed building for the health club. The plan at Exhibit 129 sanctioned by the Corporation in June 1995 showed the proposed two floors added upon the club house and these additional floors were shown for the residential purposes of defendant no.2 In earlier point of time the plan at Exhibit 131 was approved by the Municipal Corporation on 15/7/1993 and it gave a bird's eye view of the entire complex. It showed the four buildings and health club surrounded by open space and a pump room and tank in another open space. Certain conditions were imposed by the Municipal Corporation while approving this plan viz. that the club house could be used only by the flat holders and its use for commercial purposes was strictly prohibited. The plan at Exhibit 132 was another lay out approved in the year 1990 and as per the same the club house was to be constructed between building "A-1" and "A-2" and was to be surrounded by an open space. Apparently instead of a club house, a pump room and tank were constructed between these two buildings and the location of the club house was shifted towards the North Western corner of the plot. Thus the plan at Exhibit 132 was revised by the plan at Exhibit 131 showing the club house essentially a

single storeyed structure. The brochure given along with the agreement (Exh. 29) was at Exhibit 28 and the map was shown at Exhibit 30. Thereafter the plan at Exhibit 128 was approved in January 1995 and Exhibit 129 was approved in the year 1995. The deed of declaration (Exhibit 33) as noted earlier was registered unilaterally by the Defendant nos.1 and 2 on 1/7/1993 and the deed of apartment (Exhibit 35) was registered on 08/11/1994 i.e. prior to the approval granted to the plans at Exhibits 128 and 129 but after the plan at Exhibit 131 was sanctioned on 15/7/1993. There is a bungalow shown near the buildings "C" and "D" and which is admittedly the personal property of the defendant no.2 and his wife and it is not part of the subject scheme "Parmar Paradise". The health clubs were shown to have been sold to defendant no.2 and his wife on 29/9/1996 along with all rights and interest therein. These health clubs were handed over to some third parties to run as a commercial venture. The defendant no.2 also claimed that he had the right to construct above the health club and thus additional two storeyed construction was put up thereby forming two additional residential units belonging to the defendant no.2.

8. One of the conditions at Exhibit 131 approval granted by the Corporation clearly put restrictions on the use of the club and it confined only to the flat owners and in addition it was not permissible to run it as a commercial venture. The said condition is reproduced as under :

> "Only the flat holders in the said property can use the club. The club cannot be used for commercial or gainful purpose in any manner. The said condition shall be binding on the owner, promoter, developer, flat holders and society."

. On behalf of the plaintiffs in the later suit one Shri Ashok Kauromt Idnani was examined whereas in RCS No.326 of 1995 the plaintiff - Anil Vishindas Mahatney was examined and the defendant no.2 was examined to oppose the suit. Certain clauses of the agreement for sale which are relevant for the present purposes are reproduced as under :

> "AND WHEREAS the Purchaser demanded from the Vendor and the Vendor has given inspection to

the Purchaser of all the documents relating to the said property, the said order, plans, designs and specifications and of such other documents as are specified under the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 and the Rules made thereunder.

AND WHEREAS the builder will be selling the flats in the said building on what is known as ownership basis with a view that ultimately the purchasers of all the flats in the said building should **form themselves into a Co-operative Society duly registered under Maharashtra Co-operative Societies Act, 1960 or they should incorporate a Pvt. Ltd. Company with themselves as share holders** and upon the purchaser of all the flats in the said building paying in full all their respective dues payable to the builders under the agreement and strictly complying with all the terms and conditions of their respective with the builders in a form similar to this agreement, **the builders shall cause to be**

transferred the said plot together with the building constructed therein or in favour of such Co-operative Housing Society or a Limited Company as the case may be. (Emphasis supplied)

4. F.S.I. : ... ... The residual F.A.R. (F.S.I.) in the plot or the layout not consumed will be available to the Promoter till the registration of the society. Whereas after the registration of the society the residual F.A.R. (F.S.I.) shall be available to the Society. Before the execution of the sale deed if any additional FSI is available and claimed by the Promoters, they shall be entitled to construct additional flats etc. upon the said property and dispose off the same in as similar manner.

9. POSSESSION : The Promoter shall give possession of the flat to the Flat Purchaser on or before 15th November 1992.

10. The flat holder agrees and binds to pay regularly every month by 5th of each English

Calendar month to the Builder until the assignment of the said property consisting all the flats in building is executed in favour of a co-operative housing society or Private Limited Company / Association.

19. ... When the Co-operative Society or Private Limited Company is registered or incorporated, as the case may be, and all the amounts due and payable to the Builders are paid in full, the Builders shall cause transfer and assignment of rights, title and interest of owners in respect of the said property in favour of such Co-operative Society or the Limited Company or Association of flatholders as the case may be.

21. Shri P. Narayan, Advocate of the Builders shall prepare and / or approve, as the case may be, the conveyance and all other documents to be executed in pursuance of this agreement as also bye-laws or the memorandum of Articles of Association, Declaration etc. in connection with the formation, registration and / or incorporation of the Co-operative

Society or Limited Company of Association, as the case may be. All the cost charges and expenses in connection with the preparation and execution of the conveyance and other documents and the formation registration and incorporation of the Co-operative Society or Limited Company or Association as the case may be shall be borne, shared and paid by all the flatholders in the building to be constructed, payable by the flatholders in the building to be constructed, payable by the flatholders and that the builders shall not in any event be liable to pay such costs, charges and expenses."

8A. The above conditions incorporated in the agreement for sale clearly indicated that the housing complex by name "Parmar Paradise" was to be converted into a Co-operative Housing Society or a Private Limited Company or an Association of Flatholders and on its formation the entire property including open space was to be transferred to such Society, Private Limited Company or the Association, as the case may be. It was the responsibility of the developer’s Advocate to prepare the conveyance and all other

documents for registration of such society, private limited company or association as the case may be and all the costs, charges and expenses in that connection would be borne by the purchasers/flat holders. Once the Society / Company / Association was registered the builder - developer would be out of picture and would have no right of any encumbrances or any FSI and it was obvious that in view of these agreement terms, an amount of Rs.3100/- was collected as per the receipt at Exh. 32 in February 1993 from the flat owners. Thereafter the completion certificate was issued by the Corporation on 30/6/1993. The builder did not take any steps to register the society / association or incorporate a private limited company and instead unilaterally the defendant - builders got registered a Deed of Declaration at Exhibit 33 on 1/7/1993 under the Apartments Act so as to grab the remaining FSI and to change the plans for club house, health club and other amenities which is so clear from the following clauses in the Bye-laws of Parmar Paradise Condominium and attached as Exhibit "B" to the Deed of Declaration :

"Two health clubs bearing health club No.1,

admeasuring 46 sq.mtr. and Health Club No.2 admeasuring 534 sq.mtr. and garden area above health club admeasuring 1260.04 sq.mtr. shall be exclusively owned by Mr. & Mrs. I.C. Parmar with a right to raise additional floors over and above the health clubs as per the choice of the grantors.

The servant room / store room admeasuring 3 x 3.6 sq .mt. at the entrance of western side wall shall also be the restricted property of Mr. & Mrs. Parmar.

The floating F.S.I. of the entire area : That Mr. & Mrs. Parmar shall have right to floating F.S.I. either at existing health club building or their own bungalow or any other area of the plot or on the plot elsewhere.

Rooms in B & C Building : The rooms below B and C Building admeausring 1.8 x 3.2 sq.mtrs. shall be the exclusive property of the Grantors.

The term "Grantor" has been defined in the Deed of Declaration and it means Defendant No.1 thorough its Managing Director, the Defendant no.2.

9. After registration of this Deed of Declaration on 1/7/1993 the building plan at Exhibit 131 was approved on 15/7/1993. The same was changed again unilaterally at Exhibits 128 and 129. The flat owners were kept in dark and the defendant nos.1 and 2 in their Written Statement before the trial Court contended that Section 7-A of the Flats Act permitted them to utilise the additional FSI at any time and, therefore, the construction of two additional floors with a built up area of 1500 sq. ft. above the club house was not any breach of the Flats Act though it may be in breach of the agreement or the denial of some of the common amenities set out in the Schedule "C" to the agreement for sale may amount to breach of agreement but certainly the defendant nos. 1 and 2 were not guilty of acting in breach of the Flats Act. This submission found favour with the trial Court but the lower Appellate Court examined the scheme of the Flats Act, the relevant provisions of the agreement for sale as well as the terms and conditions imposed by the Corporation while approving the plans. The

lower Appellate Court also placed reliance on a decision of this Court in the case of Ravindra Mutneja & ors. Vs. M/s. Bhavan Corporation & ors. **[2003 (3) All MR 521]** and held that once the constructed flats were handed over to and occupied by the flat owners and the completion certificate was issued by the Corporation on 30/6/1993, the defendant nos.1 and 2 could not invoke the provisions of Section 7-A of the Act and the said benefit was available to the builders - developers prior to the completion of the construction and handing over of the constructed flats to the respective owners. The learned counsel for the appellants submitted that the view taken by the lower Appellate Court relying upon the decision of this Court in the case of Ravindra Mutenja (Supra) is grossly erroneous and it ought to have been held, as has been held by the trial Court, that the provisions of Section 7-A of the Flats Act could be invoked by the builder/developer at any point of time and there cannot be any restriction on taking the benefits of the said provision. In short it was contended that the flat owners were themselves required to register a Co-operative Society and on their failure to do so, the defendant nos.1 and 2 registered the Deed of Declaration under the

Apartments Act and the Apartment Deeds were subsequently registered. The terms of the Apartment Deeds as well as the Bye-laws annexed to the Deed of Declaration are binding on all the flat owners as they have signed the same unequivocally or without any protest. Thus the defendant nos.1 and 2 were not guilty of acting in breach of the contractual obligation or the statutory provisions viz. the Flats Act, urged the Learned Counsel for the Appellants.

10. Let us reproduce some of the relevant provisions of the Flats Act and admittedly the agreements for sale clearly stipulated that the Housing Scheme was undertaken under the said Act and not under the Apartments Act.

> 4(1A) The agreement to be prescribed and sub-section (1) shall contain inter alia the particulars as specified in clause (a); ...
>
> (a) particulars, -
>
> (i) ... (ii) ... (iii) ... (iv) ...

(v) the precise nature of the organisation to be constituted of the persons who have taken or are to take the flats.

5. The promoter shall maintain a separate account in any bank of sums taken, by him, from persons intending to take or who have taken flats, as advance or deposit including any sums so taken towards the share capital for the formation of co-operative society or a company, or towards the outgoings (including ground rent, if any, municipal or other local taxes, taxes on income, water charges, electricity charges, revenue assessment, interest on any mortgage or other encumbrances if any); and he shall hold the said moneys for the purposes for which they were given and shall disburse the moneys for those purposes and shall on demand in writing by an officer appointed by general or special order by the State Government for the purpose, make full and true disclosure of all transactions in respect of that account.

7A. For the removal of doubt, it is hereby

declared that clause (ii) of sub-section (1) of section 7 having been retrospectively substituted by clause (a) of section 6 of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) (Amendment) Act, 1986 (hereinafter in this section referred to as "the Amendment Act"), it shall be deemed to be effective as if the said clause (ii) as so substituted had been in force at all material times, and the expression "or construct any additional structures" in clause (ii) of sub-section (1) of section 7 as it existed before the commencement of the Amendment Act and the expression "constructed and completed in accordance with the plans and specifications aforesaid" and "any unauthorised change in the construction" in sub-section (2) of section 7 shall, notwithstanding anything contained in this Act or in any agreement, or in any judgment, decree or order of any Court, be deemed never to apply or to have applied in respect of the construction of any other additional building or structures constructed or to be constructed

under a scheme or project of development in the layout after obtaining the approval of a local authority in accordance with the building rules or building bye-laws or Development Control Rules made under any law for the time being in force.

10(1) As soon as a minimum number of persons required to form a Co-operative society or a company have taken flats, the promoter shall within the prescribed period submit an application to the Registrar for registration of the organisation of persons who take the flats as a Co-operative society or, as the case may be, as a company; and the promoter shall join, in respect of the flats which have not been taken, in such application for membership of a co-operative society or as the case may be, of a company. Nothing in this section shall affect the right of the promoter to dispose of the remaining flats in accordance with the provisions of this Act.

11. A promoter shall take all necessary steps to complete his title and convey to the

organisation of persons, who take flats, which is registered either as a co-operative society or as a company as aforesaid, or to an association of flat takers or apartment owners his right, title and interest in the land and building, and execute all relevant documents therefor in accordance with the agreement executed under Section 4 and if no period for the execution of the conveyance is agreed upon, he shall execute the conveyance within the prescribed period and also deliver all documents of title relating to the property which may be in his possession or power.

11. Section 7-A was added to the Scheme of the Flats Act by Maharashtra XXXVI of 1986 consequent to the decision of this Court in the case of Kalpita Enclave Co-operative Housing Society Ltd. & ors. Vs. Kiran Builders Pvt. Ltd. & ors. **[1986 Mh.L.J. 110]**. The Legislature clearly wanted to get over the difficulty created by the judgment of this Court in Kalpita Enclave (Supra) and the Statement of Objects and Reasons for the Amendment Act XXXVI of 1986 clearly referred to the said judgment. The Scheme of Section 7-A of the Flats Act fell for consideration

before this Court in the case of M/s. Khatri Builders Vs. Mohmed Farid Khan & ors. **[1992 (1) Bom.C.R. 305]** and in paras 18 and 19 this Court held as under :

> "18. ... If in a given case, the layout permits the construction of more building or buildings in accordance with the Building Rules and Bye-Laws, it is possible to say that there should be no impediment to the construction of additional building or buildings. While, therefore, in a given case, if on a plot of land, buildings "A" & "B" existed, which have been occupied by the flat owners and if a third building "C" is being put up the question would be as to whether despite the third building "C" being permissible in accordance with the Building Rules and Bye-Laws, can the flat owners in Buildings A & B raise an objection. I need not go into this question in this case since I am only concerned with the question of a terrace flat being constructed on an existing structure. In my view, in the facts of this case, the insertion of section 7-A by the

Amending Act 36 of 1986 would not make any difference to the ratio of the judgment of Jahagirdar,J. If, therefore, the plaintiffs have objected to the terrace flat being constructed, in my view the Civil Court would have jurisdiction to entertain the suit of the plaintiffs and the plaintiffs would be entitled for an injunction prayed for.

19. The conclusions reached above would also be in tune with the Preamble of the Ownership Flats Act and the object of protecting the interests of the flat owners who are normally unorganised. It is for the protection of this class of persons that the Ownership Flats Act has been passed...."

12. The learned counsel for the appellants placed reliance on the decision of this Court in the case of Mohatta Nagar Co-operative Hsg. Soc. Ltd. Vs. M/s. Vishram Khimji & Sons & ors. **[1994 (1) Bom.C.R. 444]** and more particularly the following observations:

"Now, by section 7-A, the expression "or construct any additional structures" has been totally taken of, from section 7(1)(ii), as it existed prior to amendment with retrospective effect notwithstanding any agreement, judgment, decree or order of any Court, and it is further declared that such amendment and its expression shall be deemed never to apply or to have applied in respect of the construction of any other additional buildings, or structures, constructed or to be constructed under the scheme or project of development in the layout, after obtaining approval of local authority, in accordance with the Building Rules or Building Bye-laws or Development Control Rules made under any law for the time being in force. These words, used in section 7-A make it amply clear that construction of any other additional building or structures, whether made in the past or to be made in future, after coming into force of the amended Act, is permissible so long as it is under a scheme or project of development in the layout, and subject to the relevant rules and bye-law. It does not mean that before a

promoter could take advantage of this provision of section 7-A, it must necessarily be that additional buildings or structures, must be a part of the plan already approved by the local authority. If such additional building or structure, is already constructed, after coming into force of the amended provisions, it would be legal, provided it is under the scheme or project of development in the layout, and with the approval of local authority, in accordance with the Building Rules or Building Bye-laws. In my view, therefore, words "additional buildings or structures constructed or to be constructed" would include proposals which are not already approved but, which could be sent for approval of the necessary local authority and on obtaining such approval, it would be perfectly legal for the promoter to make such additional construction of buildings or structures, though, it was not permissible prior to the amendment as per section 7(1)(ii) of the said Act...."

13 In the case of Ravindra Mutenja & ors. (Supra), this Court referred to the earlier decisions in the case of (1) Kalpita Enclave Co-op. Housing Society Ltd. (Supra), (2) Mohatta Nagar Co-operative Housing Society Ltd. (Supra), (3) Down Mangor Valley Residents' Welfare Association Vs. Mormugao Municipal Council, Goa **[AIR 2002 Bom. 258]** and held on the scope of Section 7-A of the Flats Act, as under:

> "13. The real issue as has been noted earlier is what is the stage up to which the developer/owner can put up additional construction after the building in terms of the registered plan has been constructed and occupied. In my opinion, once the buildings shown in the approved plan submitted in terms of the regulations under an existing scheme filed before the authorities under MOFA Act, have been completed and possession handed over, the builder/owner cannot contend, that because he has not formed the society and/or not conveyed the property by sale deed under

the Act he is entitled to take advantage of any additional F.S.I. that may become available because of subsequent events. That would be so at the stage the building is under construction or the building is not completed and/or purchasers are not put in occupation provided such building forms part of the development plan and/or lay out plan already approved. Subsequent amendment of the lay out plan after the building plan is registered under MOFA, without the consent, prima facie, of the flat purchasers would not be permissible. It may be possible to accept that the development plan could be modified as long as the right of the purchasers and the benefits which they are entitled to including recreational and open areas are not effected by the revised development plan. **Once the building is completed and the purchases are put in occupation in terms of plan filed and the time to form the society or convey the property in terms of the agreement or rules framed under MOFA is over, the permission of such purchasers would be required.**" (Emphasis supplied)

14. In the instant case the Flat Owners were put in possession in or prior to December 1992 of the respective flats and the completion certificate was issued by the Pune Municipal Corporation on 30/6/1993. It was, therefore, necessary for the Defendant Nos.1 and 2 to obtain the permission of the plaintiffs for proposed modified and/or additional construction as per the plan at Exhibit 131 approved on 15/7/1993 or Exhibits 128 and 129. This has not been done and, therefore, the action of the defendant nos.1 and 2 in proceeding to construct two residential floors, health clubs etc. is illegal and the said defendants cannot rely upon the provisions of Section 7-A of the Flats Act. It was necessary for the Pune Municipal Corporation while approving the plans at Exhibits 128, 129 and 131 to verify and ensure that the flat owners / plaintiffs had given their consent / permission and / or no objection for such modifications and thus the Corporation failed to perform its duty in following the law as laid down by this Court and the provisions of the Flats Act in the instant case. It would not be enough for the Corporation to state that the additional FSI was

available and, therefore, the plans at Exhibits 128, 129 and 131 were approved by it. The Corporation being a planning authority under the MRTP Act, it is obliged to ensure that when such plans are submitted, they comply with the requirements of the Flats Act or the Apartments Act, as the case may be as well as the Maharashtra Co-operative Societies Act, 1960. The defendant nos.1 and 2 have, undoubtedly, acted dishonestly and in breach of the agreement for sale as well as the provisions of the Flats Act. The trial Court had held that the defendant nos.1 and 2 had not acted in breach of any statutory provisions solely on the ground that they were entitled to rely upon the provisions of Section 7-A of the Flats Act for the additional construction they had undertaken and the Appellate Court rightly stepped in to correct this legal error committed by the trial Court. The disputes between the parties before both the Courts below were limited to (a) whether there was any breach of the agreement for sale and (b) whether the additional construction done was illegal. So far as the first issue is concerned, the trial Court had answered in the affirmative whereas on the second issue it held in favour of the defendant - builders. The lower Appellate Court examined the scheme of

Section 7-A of the Flats Act, the judgments of this Court and more particularly the judgment in the case of Ravindra Mutneja (Supra) and held that once the scheme was completed, the flat owners had occupied their respective flats and the Corporation had issued the completion certificate, the builders could not rely upon the provisions of Section 7-A of the Flats Act for additional construction even when the same was done as per the approval granted by the Pune Municipal Corporation and this view of the lower Appellate Court is in keeping with the law laid down by this Court. The terms of the agreement for sale and particularly in Clause 4 onwards, as reproduced hereinabove, will have to be interpreted to mean that the defendant nos.1 and 2 were obliged to register a co-operative housing society and transfer all the rights, titles and amenities to such a society within the specified period of six months, from handing over the possession of the flats or after the completion certificate was issued by the Corporation on 30/6/1993. But the builders, being aware that they would be liable to face criminal prosecution and to grab the additional FSI, clandestinely registered the deed of declaration on 1/7/1993 inspite of the fact they had collected the shares amount and expenses

required for the formation and registration of a co-operative housing society. The plaintiffs signing the deed of apartments cannot act as an estoppel to seek to enforce their legal rights under the agreement as well as the Flats Act. When the housing scheme was developed under the Flats Act, it was not permissible to the defendant nos.1 and 2, to unilaterally subject the said scheme to the provisions of the Apartments Act and resort to alterations or the additional construction without the prior permission/consent of the flat owners. The developers were clearly determined to retain their hold over Parmar Paradise forever as is evident from the terms of the deed of declaration. Hence these appeals do not involve any substantial question of law for the consideration of this Court and, therefore, they must fail at the threshold.

15. Hence the appeals are dismissed in limine and the decrees passed by the lower Appellate Court are hereby confirmed. It is held that the Defendant Nos.1 and 2 have illegally constructed two floors on the health club and to the extent of 1500 sq.ft. and the consequences of such illegal construction will follow. The Defendant nos.1 and 2 shall take due

steps to provide the remaining amenities as mentioned in Schedule "C" to the agreement for sale within a period of two months from today. The sale of health clubs in favour of defendant No.2 and his wife on 29/9/1996 is hereby declared as null and void ab initio.

16. Civil Applications do not survive and the same stand dismissed.

(B.H.MARLAPALLE,J.)